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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PHILLIPS PETROLEUM Company *et al.*,
Petitioners,

versus

STATE OF MISSISSIPPI *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Mississippi

**BRIEF *AMICUS CURIAE* of the THIRTEEN ORIGINAL STATES:
NEW YORK, NEW HAMPSHIRE, MASSACHUSETTS, CONNECTICUT, NEW JERSEY, PENNSYLVANIA, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA, and RHODE ISLAND
Joined by the
COASTAL STATES ORGANIZATION
IN SUPPORT OF RESPONDENTS.**

DAVID C. SLADE, ESQ.
Counsel of Record
COASTAL STATES ORGANIZATION
Suite 312
444 N. Capitol Street, NW.
Washington, D.C. 20001
202-628-9636

Of Counsel:
Jane K. Stahl, Esq.
State of Connecticut

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

STATE OF NEW YORK

By: ROBERT ABRAMS
Attorney General
State Capitol
Albany, N.Y. 12224

STATE OF MARYLAND

By: J. JOSEPH CURRAN
Attorney General
Tawes State Office Building
Annapolis, MD 21401

STATE OF CONNECTICUT

By: JOSEPH I. LIEBERMAN
Attorney General
30 Trinity Street
Hartford, CT 06106

STATE OF RHODE ISLAND

By: JAMES E. O'NEIL
Attorney General
72 Pine Street
Providence, R.I. 02903

COMMONWEALTH OF VIRGINIA

By: MARY SUE TERRY
Attorney General
101 N. 8th Street, 5th Floor
Richmond, VA 23219

STATE OF SOUTH CAROLINA

By: T. TRAVIS MEDLOCK
Attorney General
P.O. Box 11549
Columbia, S.C. 29211

COMMONWEALTH OF PENNSYLVANIA

By: LEROY S. ZIMMERMAN
Attorney General
Strawberry Square
Harrisburg, PA 17120

STATE OF DELAWARE

By: CHARLES M. OBERLY, III
Attorney General
820 N. French St.
Wilmington, DE 19801

STATE OF NEW HAMPSHIRE

By: STEPHEN E. MERRILL
Attorney General
State House Annex
25 Capitol Street
Concord, N.H. 03301-6397

STATE OF NEW JERSEY

By: W. CARY EDWARDS
Attorney General
Justice Complex, CN 112
Trenton, N.J. 08625

STATE OF NORTH CAROLINA

By: JAMES G. MARTIN, JR.
Governor
State Capitol
Raleigh, N.C. 27611

COMMONWEALTH OF MASSACHUSETTS

By: JAMES M. SHANNON
Attorney General
One Ashburton Place, 1902
Boston, MA 02108-1698

STATE OF GEORGIA

By: MICHAEL J. BOWERS
Attorney General
132 State Judicial Building
Atlanta, GA 30334

COASTAL STATES ORGANIZATION

By: RICHARD F. DELANEY, CHMN.
444 N. Capitol Street, N.W.
Washington, D.C. 20001
202-628-9636

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Joined by the
COASTAL STATES ORGANIZATION

IN SUPPORT OF RESPONDENTS.

STATEMENT OF INTEREST OF *AMICI CURIAE* IN THE OUTCOME OF THIS CASE

This case presents the question of what Public Trust shorelands Mississippi received when she entered the Union

in 1817 on an equal footing with the thirteen original States. The Mississippi Supreme Court concluded that the shorelands so received and held in trust are those lands subject to the ebb and flow of the tide and below the mean high tide line as it existed in 1817. This ruling is based on the Equal Footing Doctrine; when Mississippi entered the Union she did so on an equal footing with the thirteen original States, "*viz*, as each one of the thirteen held its tidelands and navigable waters in public trust ... ." *Cinque Bambini Partnership v. State*, 491 So. 2d 508, 512 (Miss. 1986).

The question of how "each one of the thirteen held its tidelands and navigable waters in public trust" is one that the thirteen original States are in the best position to answer. This question is not a simple one, for the thirteen original States were not uniform in the extent and manner to which they held their shorelands in trust for all the people. "[T]he nature and degree of such rights and privileges [in the shorelands] differed in the different Colonies, and in some were created by statute, while in others they rested upon usage only." *Shively v. Bowlby*, 152 U.S. 1, 18 (1894). Nonetheless, it is fundamental to answer this question in order to ascertain what the remaining 37 "new" States received by force and effect of the Equal Footing Doctrine. Answering this question is the central focus of this brief.

The Coastal States Organization, a representative organization of the Governors of the coastal States, recognizes the importance of this case to all of its member States. The Coastal States Organization, having no vested interests in the outcome of this case, has served to facilitate the development of this brief *amicus curiae* among the thirteen original States.

The outcome of this case is of major importance to all coastal States. Indeed, the Court is dealing here with an issue directly related to the constitutional sovereignty of

the States. A reversal of the Mississippi Supreme Court decision could affect the interests of all coastal States in thousands upon thousands of acres of their tidelands, heretofore understood to be held either in sovereign ownership, or subject to the public shoreland trust servitude.

Petitioners state, and we agree, that "[T]he 13 original states are the divining rods of the equal footing doctrine." Petitioners' Brief at 23. Because of the obvious truth of the statement, we, as the thirteen original States that reserved their shorelands when adopting the Constitution of the United States 200 years ago, submit this brief *amicus curiae* to present our view with one voice as to the nature and extent of our reserved shoreland trusts which were, by force and effect of the Equal Footing Doctrine, perpetuated as each new State entered the Union.

SUMMARY OF ARGUMENT

The thirteen original States, upon adoption of the United States Constitution 200 years ago, reserved a public trust interest in, at a minimum, all of their shorelands subject to the ebb and flow of the tide below the mean high tide line, and held them in trust for the benefit of all the people. The States held these trust shorelands not only for the public's use for navigation, but for other purposes, including commerce, land transportation, fishing, fowling, sustenance and bathing. Entering the Union upon an equal footing with the thirteen original States, each of the new States received in trust those shorelands subject to the ebb and flow of the tide, regardless of the navigability of the adjacent waters. Each new State, in its own trustee capacity, upon entering the Union had the authority to define both the nature of her sovereignty over, and the physical boundaries of, her trust shorelands to the same extent as the thirteen original States.

ARGUMENT

A. At the time of the adoption of the Constitution, the thirteen original States reserved those lands subject to the ebb and flow of the tide, regardless of the navigability of the adjacent waters, at least up to the mean high tide line. As the corpus of this trust was originally funded by the thirteen original States, so has it been perpetuated by the Equal Footing Doctrine to the 37 States that have since joined the Union.

"The original States withheld their tidelands and navigable waters from the United States at the time of adoption of the Constitution." *Cinque Bambini Partnership v. State*, 491 So. 2d 508, 512 (Miss. 1986). *See also Pollards' Lessee v. Hagan*, 44 U.S. (3 How.) 212, 228 - 230 (1843); *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867); *Weber v. Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 65 - 66 (1873); *Knight v. U.S. Land Association*, 142 U.S. 161, 183 (1891); *Shively v. Bowlby*, 152 U.S. 1, 26 (1894); *United States v. Mission Rock Co.*, 189 U.S. 391, 404 (1903). As each one of the thirteen original States held its tidelands and navigable waters in trust the United States created like trusts in each new State. *Montana v. United States*, 450 U.S. 544, 551 (1981). Thus, the question of the extent, and the nature of the public uses, of the shorelands withheld in trust by the thirteen original States at the time the United States Constitution was adopted must be answered in order to determine with any assurance what the 37 "new" States, such as Mississippi, received by force and effect of the Equal Footing Doctrine.

To answer this question it is necessary to look at the English common law, because "the common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several Colonies and States, or by the

Constitution and the laws of the United States." *Shively v. Bowlby*, 152 U.S. 1, 14. In other words, "upon the American Revolution, all the rights of the Crown and Parliament vested in the several States, subject to the rights surrendered to the national government by the Constitution of the United States." *Id.* 14 - 15. *See also Martin v. Waddell*, 41 U.S. 367, 410 (1842); *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 30 (1869). However, "since the revolution, no part of the common law has been adopted except that which was proper for our country." *Carson v. Blazer*, 2 Binn. 475, 477 (Pa. 1810). Thus, because it provided the foundation for colonial law but was subject to change by the colonies after the Revolution, the English common law is of central, but not controlling, importance.

This Court focused on the English common law of the tidelands in the case of *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10 (1935), looking specifically at the "extent of the right of the Crown to the seashore." Discussing the case of *Attorney General v. Chambers*, 4 De G.M. & G. 206 (1789), this Court noted the conclusion of Lord Chancellor Cranworth that "the medium high tide between the springs and the neaps" must be treated "as bounding the right of the Crown." *Borax Consolidated, Ltd. v. Los Angeles, supra* at 25.

The *Chambers* case, decided two years after the United States Constitution was ratified, suggests that the thirteen colonies also held sovereign control over their seashores up to the mean high tide line. As noted, however, after the Revolution each colony was free to modify the common law as necessary with respect to the uses and physical character of her shorelands. The *Chambers* case further suggests that the colonies determined what shorelands they held according to the tidal influence on those lands, and not according to the "navigability" of the adjacent waters. These suggestions withstand scrutiny when the thirteen original State laws and decisions are reviewed with an eye

towards establishing what shorelands they reserved at the time the Constitution was adopted.

Massachusetts: The Massachusetts Bay Colony modified by ordinance in 1641 its common law of the shorelands. Prior to this ordinance, the colony abided by the English common law that "all arms of seas, coves, creeks, &c., *where the tide ebbs and flows*, are the property of the sovereign..." *Commonwealth v. Charlestown*, 18 Mass. (1 Pick.) 180, 182 (1822) (emphasis added). "[T]his right of the sovereign extends to ordinary high-water mark, so that the shore, which is the space between high-water and low-water, belongs also to the sovereign." *Ibid. See also Storer v. Freeman*, 6 Mass. 435, 437 (1810). Thus, by the common law "he to whom a house lot was granted which was bounded upon the sea, would be the proprietor only as far as high water mark," for below this all lands subject to the ebb and flow of the tide were public lands. *Commonwealth v. Charlestown*, 18 Mass. at 182.

In order to induce private parties to erect wharves below the high water mark, the colonial legislature passed the ordinance of 1641 amending the common law. *Storer v. Freeman*, 6 Mass. at 437. This ordinance granted to adjacent upland owners title to the shore down to the mean low tide mark or one hundred rods (about 1650 feet) from the mean high tide mark, whichever was less. *Id.* Public rights to fishing, fowling, and navigation in the intertidal zone were, however, reserved from the grant. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 67-68 (1851). Thus, the public retained a direct proprietary interest in the intertidal zone in addition to its sovereign power to regulate private use of this area for the common good. *Id.* at 82-88.

The public's proprietary and sovereign rights in the intertidal zone vested in the Commonwealth at the time of the Revolution, and were not transferred to the United States by the subsequent adoption of the Constitution. *Id.*

at 82, *citing New Orleans v. The United States*, 35 U.S. (10 Pet.) 662, 737 (1836); *Pollards' Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1843). Since that time, Massachusetts courts have consistently upheld the public's rights to fishing, fowling and navigation in the intertidal zone. Thus, for example, a private party cannot exclude the public from taking shellfish on land in the intertidal zone, irrespective of whether he holds title to such land. *Weston v. Sampson*, 62 Mass. (8 Cush.) 347, 355 (1851). *See also Butler v. Attorney General*, 195 Mass. 79, 84, 80 N.E. 688, 689 (1907) (upholding the public's right to "fishing and free fowling" in the intertidal zone).

The Commonwealth's dominion over the public rights in tidal waters is not dependent on whether the waters are navigable-in-fact. See *Commonwealth v. Vincent*, 108 Mass. 441, 447 (1871) recognizing "no restriction upon [the Commonwealth's] authority to regulate the public right of fishing" in the tide waters and great ponds that "are not navigable from the sea for any useful purpose".

New Hampshire: In New Hampshire, "[i]t is well established law" that "tide waters are public waters. As such they are within the power of the Legislature to make such laws as the public good may require." *Sibson v. State*, 110 N.H. 8, 10, 259 A.2d 397, 399 (1969) (cases cited therein omitted). *See also Concord Manufacturing Co. v. Robertson*, 66 N.H. 1, 4, 25 A. 718, 719 (1889). According to New Hampshire case law, tidewaters "are those in which the tide ordinarily ebbs and flows, including the sea, and also bays, rivers, and creeks, so far as they answer this description. A body or stream of water cannot be considered as tidal merely because, under unusual circumstances, the level of the water is affected by the tide, nor is the amount of salt in the water material." *Sibson v. State*, 110 N.H. at 10, quoting 2 Tiffany, *Real Property* sec. 659 (3rd ed.). While navigability-in-fact is the appropriate test to determine whether freshwater lakes and streams are public waters, since New Hampshire's earliest days the action of

the tide has furnished "a convenient means of locating the boundary of the largest reservoir of public water." *Concord Manufacturing Co. v. Robertson*, 66 N.H. at 5.

Besides recognizing tidewaters as public waters, the New Hampshire Supreme Court confirmed a century ago the long-standing common law rights of the public in New Hampshire's shoreland extending seaward from the mean high-water mark. In 1889, Chief Justice Doe wrote in *Concord Manufacturing Co. v. Robertson*, *supra*, as follows:

> In *Nudd v. Lamprey* [an unreported case] decided in the county of Rockingham at the December term, 1847, it was held that the provision of the Massachusetts ordinance [of 1641] relating to the shore of tide-waters has not been adopted and is not in force in this state; and there is no ground on which that case can be overruled. The introduction of any other line than high-water mark as the marine boundary would overturn common-law rights that had been established here, by a usage and traditional understanding of two hundred years duration, before they were questioned in *Nudd v. Lamprey*.

Id. at 27, 25 A. at 730-731. As to the extent of the public trust, the Court in *Concord Manufacturing* concluded that the same dictates of justice and reason—which mandated that the shores and arms of the sea be held in fee by the State for common use—also vested a private right of reasonable use in owners of the adjoining land. *Id.* at 18; *Sibson v. State*, 110 N.H. at 10, 259 A.2d at 400. This private right is in turn:

> [s]ubject to the paramount right of the State to control [public waters] reasonably in the interests of navigation, fishing and other public purposes. In other words, the rights of these owners are burdened with a servitude in favor of the State which comes into operation when the State prop-

> erly exercises its power to control, regulate, and utilize such waters.

Sibson v. State, supra, citing State v. Stafford Co., 99 N.H. 92, 97, 105 A.2d 569, 573 (1954); *see Concord Manufacturing Co. v. Robertson, supra* at 5.

Rhode Island: Rhode Island case law consistently establishes that title to shorelands below the high water mark, and subject to the ebb and flow of the tide, lies in the State. "In this state, at common law, the fee of the soil in tide waters below high water-mark is in the state." *Bailey v. Burges*, 11 R.I. 330, 331 (1876); *Brown v. Goddard*, 13 R.I. 76, 81 (1880); *Folsom v. Freeborn*, 13 R.I. 200, 204 (1881); *Gerhard et ux. v. Seekonk River Bridge Commissioners*, 15 R.I. 334, 335 (1886); *Allen v. Allen*, 19 R.I. 114, 115 (1895); *Jackvony v. Powel*, 67 R.I. 218, 226 (1941). "This right of the State is held, however, by virtue of its sovereignty, and in trust for all the inhabitants, not as a private proprietor. The public rights secured by this trust are the rights of passage, of navigation and fishery, and these rights extend ... to all land below high water unless it has been so used, built upon or occupied, as to prevent the passage of boats, and the natural *ebb and flow of the tide*."-(Emphasis added). *Allen v. Allen*, 19 R.I. at 116; *Jackvony v. Powel*, 67 R.I. at 226.

Rhode Island's Constitution, ratified in 1843, protects certain rights of the public in the use of the State's extensive shores, most prominent of which are the shores along Narragansett Bay. Article I, section 17 of the Rhode Island Constitution provides: "The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have heretofore been entitled under the charter and usages of this state."

The shores held in trust in Rhode Island, and upon which the public's "privileges" are constitutionally protected, are those "shores bordering on tidewaters and lying between the lines of mean high tide and mean low tide

. . ." *Jackvony v. Powel*, 67 R.I. at 225. The fact that the waters adjacent to the shoreland are or are not navigable has never been a requisite criteria for determining what tidelands of Rhode Island are held by the State in trust.

Connecticut: By the Charter of 1662, Charles II granted to the Colony of Connecticut title to the shores of the sea. The physical extent of this grant and the competency of the king to make such a conveyance were undoubted.

> "A river, where the tide ebbs and flows, is an arm of the sea; and the shore is that space of ground, which is between ordinary high water and low water mark. The title of the king, *prima facie*, to all ports and arms of the sea to high water mark, and to the soil thereof, has long been established law; and ... it is settled, that he may grant the property of the soil between high and low water mark to a subject or corporation."

East Haven v. Hemingway, 7 Conn. 186, 198 (1828).

Adoption of the English common law regarding public ownership of all lands below "high water mark" has been continually reaffirmed in Connecticut case law. "The doctrine of the common law is, that the right to the soil of proprietors of land on navigable rivers extends only to high water mark; all below is *publici juris* - in the king, in England. That is the law in Connecticut; for we have no statute abrogating it." *Chapman v. Kimball*, 9 Day 38, 40 (1831). *See also Nichol's v. Lewis*, 15 Conn. 137, 143 (1842) ("land between high and low water mark belongs to the public"); *Simons v. French*, 25 Conn. 346, 352 (1856) ("In Connecticut, it is now settled that the public, representing the former title of the king, is the owner in fee of such flats up to the high water mark"). This same line of early cases established that the owner of adjoining upland had the right to wharf out upon or otherwise occupy

the land beyond high water provided he did not interfere with navigation.

As evidenced by the writings of a leading State jurist of the times, Connecticut subscribed to the "legal" definition of navigability. That is, arms of the sea and rivers were considered navigable "as far as the sea flows and re-flows." 1 *Swift Digest* 109 (1822). Within the context of colonial times, navigable waters as discussed in Connecticut case law referred to tidal influence rather than navigability-in-fact. For example, in *Adams v. Pease*, 2 Conn. 481, 484 (1818), the court stated that "every river, where the sea ebbs and flows, is by the common law, considered as navigable; and all rivers not thus distinguished, are not navigable."[1]

Thus, In Connecticut, title in the lands subject to the ebb and flow of the tide and below the high water mark was held by the State. It is these tidally influenced shorelands she reserved upon adoption of the Constitution.

New York: It has been long established that New York's shoreland rights were defined without reference to navigability, but rather to the tidal influence on the lands. Thus, the power of the State extends over waters which "though not navigable in fact are deemed navigable in law ... .

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[1] It must be noted that petitioners cite two Connecticut cases for the proposition that not all tidal streams are navigable. See Petitioners Brief, at 26. Both *Wethersfield v. Humphrey*, 20 Conn. 218 (1850) and *Groton v. Hurlburt*, 22 Conn. 178 (1852), however, were concerned not with navigable waters, *per se*, nor with a determination of public tidelands, but with obstructions to navigation which would interrupt commerce. Navigability, navigable waters and the standards by which they are defined have always varied depending on the application of such determinations. It is no more appropriate to apply the narrower commerce clause/navigable water standard to the determination of public tidelands, than it would be to apply the broader regulatory/navigable water standard enunciated by this Court in defining navigable waters under the Clean Water Act. *See United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455 (1985).

Over such waters the power of the State extends." *State v. Bishop*, 359 N.Y.S. 2d 817, 820, 46 A. 2d 654, 656 (1974).

As early as 1829 an appellate court of New York held that the navigable rivers and arms of the sea where the tide regularly ebbs and flows belong to the people. *Lansing v. Smith*, 4 Wend. 9 (1829). An 1832 decision held that "as a general rule, a grant of lands bounded on tide waters extends only to ordinary high-water mark." *Wismall v. Hall*, 3 Paige Ch. 313, 315 (N.Y. 1832). In a review of the law in 1925, the New York State Attorney General advised that the people have common-law rights, constituting a public trust, to the land below the mean high water line over which the tide ebbs and flows. *Matter of Tidal High-Water Line*, 33 New York State Dept. Repts. 415 (1925).

It is also well established in New York "that a conveyance by a governmental agency of land fronting on a navigable body of water conveys title only to the high water line." *Do'phin Lane Association v. Town of Southampton*, 72 Misc. 2d 868, 882, 339 N.Y.S. 2d 966, 981 (1971). "The foreshore, or land under the waters of the sea and its arms, between high and low-water mark, is subject, *first*, to the *jus publicum* - the right of navigation, and when the tide is out, the right of access to the water for fishing, bathing and other lawful purposes to which the right of passage over the beach may be a necessary incident." *Tiffany v. Town of Oyster Bay*, 234 N.Y. 15, 20, 136 N.E. 224, 225 (1922).

The authority of the State of New York to convey land under the tide waters is accordingly limited. "The title of the state to the seacoast and the shores of tidal rivers is different from the fee simple which an individual holds to an estate in lands. It is not a proprietary, but a sovereign right, and it has frequently been said that a trust is engrafted upon this title for the benefit of the public of which

the state is powerless to divest itself." *Coxe v. State*, 144 N.Y. 396, 405-406, 39 N.E. 400, 402 (1895). This case overturned an act of the Legislature which gave a corporation authority to reclaim and drain wetlands and tidewater marshes on or adjacent to Staten Island and Long Island. The court noted that this restriction, although not enumerated in the State Constitution, was inherited directly from the State's colonial predecessor.

> It has often been said that the legislature of this state is clothed with all the powers of the British Parliament, except as restrained by the express or implied provisions of the Constitution. When the general doctrines of the English courts on this subject are given full scope, the conclusion is inevitable that the Parliament and the Crown together were not competent to grant to a private corporation, for private purposes, the seacoast around the island below the shore line, without violating established principles of law. (*Martin v. Waddell*, 16 Peters, 367). While I am not aware of any such restriction to be found in the Constitution of this state, in terms, yet, from the very nature of the question, it must be deemed to be inherent in the title and power of disposition. The title which the state holds and the power of disposition is an incident and part of its sovereignty that cannot be surrendered, alienated or delegated, except for some public purpose, or some reasonable use which can fairly be said to be for the public benefit.

Id. at 406, 39 N.E. at 402.

New Jersey: New Jersey has consistently asserted that her sovereignty over her shorelands extended to those lands subject to the ebb and flow of the tide. Navigability was never a deciding factor. In fact, New Jersey does not assert title claims to the beds of non-tidal, though navig-

able, waterways. Statutes passed by the New Jersey legislature from 1804 to the present, and New Jersey case law, confirm this.

In 1804 "An Act to Incorporate 'The Associates of the Jersey Company' " conveyed certain submerged lands under the tidal waters of the Hudson River. New Jersey Laws of 1804, page 367. The 1851 Wharf Act permitted a property owner of lands "situate along or upon tide waters" to build wharves or other structures out to the ordinary low water line, as long as they did not interfere with the public's right of navigation. Between 1804 and 1851, there were numerous conveyances by the Legislature of State tidal lands. In each instance the lands conveyed were described either originally, or at the time, as being "under water." In no case were the lands described as "navigable." In 1869, a comprehensive riparian statute was enacted that carefully distinguished between tidewaters, to which the State claimed title, and navigable waters. N.J.S.A. 12: 3-2 to 12: 3-9.[2]

Hence, from statehood 200 years ago to the present, the New Jersey legislature continuously referred to lands

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[2] *See also* N.J.S.A. 12:3-4 (as first enacted in 1869), that prohibited the filling in any land under water below *mean high tide*; N.J.S.A. 12:3-10 (1871), that permitted any riparian owners on *tidewaters* to obtain a conveyance of the submerged lands in front of their lands; N.J.S.A. 12:3-12 (1871), that permitted the conveyance of lands *under tidewater* to riparian owners *from the original high water line*; N.J.S.A. 12:3-17 (1875), that permitted the State to conduct surveys of State claims over the *tidewaters*; N.J.S.A. 12:3-18 (1877), that provided condemnation rights for owners adjacent to *tidelands*; N.J.S.A. 12:3-19 (1891) that states that "there are islands situate in the *tidal waters* of this State, the lands below *mean high water* adjoining to which are the property of this State"; N.J.S.A 12:3-26 (1910), that prohibited the laying of pipes *under tidal waters* without the State's consent; N.J.S.A. 12:3-28 (1927), regulating the construction of bridges over "any lands of this State flowed by the *tidal waters* thereof"; and N.J.S.A. 12:3-35 and 12:3-36 (1916) that permitted the State to convey lands of the State "now or formerly under *tidewaters*" for public parks. (Emphasis added in all references).

under tidewaters, or tidal lands, and has described the boundary between State and private lands as the "mean high water" line. When the legislature wished to reference navigable waters, it did so. When it spoke in terms of title to sovereign shorelands, it referred only to tidally influenced land.

The case law supports this conclusion as well. An early assertion of ownership of the State of New Jersey to the beds of non-navigable waters led to the decision of this Court in *Martin v. Lessee of Waddell*, 41 U.S. 367 (1842). The introduction to *Martin* notes that the jury "found the premises in dispute are situated beneath the waters of the Raritan River and Bay, where the tide ebbs and flows," without any reference to its navigability. *Martin v. Lessee of Waddell*, 41 U.S. at 368. The Court upheld the power of the State to convey such lands, and found a conveyance from the East New Jersey Proprietors to be without effect. *See also Arnold v. Mundy*, 6 N.J.L. 1 (1821).

In an 1867 case, the New Jersey Supreme Court held:

> "The test by which to determine whether waters are public or private, is the ebb and flow of the tide. Waters in which the tide ebbs and flows - so far only as the sea flows and reflows, are public waters; and those in which there is no ebb and flow of the tide, are private waters." *Cobb v. Davenport*, 32 N.J.L. 369, 378 (Sup. Ct. 1867).

This decision was reaffirmed in 1876 by the New Jersey Court of Errors and Appeals, which held:

> "In *Cobb v. Davenport* ... the notion that actual navigability was the criterion of public or private ownership in the bed of waters was distinctly repudiated, and the doctrine that the ebb and flow of the tide furnished such criterion was expressly adopted as a *principle of the common law* so well settled that a citation of authorities was

> deemed unnecessary." (Emphasis added). *Attorney General v. Delaware & Bound Brook R.R. Co.*, 27 N.J. Eq. 631, 639 (E & A 1876).

The inescapable conclusion reached by an examination of the statutory and case law of New Jersey is that there was a consistent assertion of title by the State to its shorelands subject to the ebb and flow of the tide from the earliest times. These State claims were made in legislation starting in the early 1800s, and were strongly upheld by the New Jersey courts as conforming with the common law or English rule of title.[3]

Pennsylvania: The Pennsylvania Supreme Court expressed its view in 1837, that "[I]t seems agreed, that between low water and ordinary high water of the ocean, and wherever the tide ebbs and flows, is part of the com-

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[3] In their *amicus curiae* brief, the City of Elizabeth *et al.* make the assertion that the State of New Jersey abruptly and retroactively changed its claim of ownership to tidal lands in the late 1950s. They cite several cases in support of their position that New Jersey substantive property law required a dual test of navigability and tidal ebb and flow for State sovereign ownership until the late 1950s. *Amici* brief of City of Elizabeth, at 18. "An examination of those cases reveals that the word 'navigable' was either used in connection with a body of water concededly navigable, or that the word was employed gratuitously as an additional word of description." *Schultz v. Wilson*, 44 N.J. Super. 591, 602, 131 A. 2d 415, 422 (App. Div. 1957). Another leading case in which certain language refers to navigability is *Stevens v. Paterson & Newark R.R. Co.*, 34 N.J.L. 532, 3 Am. Rep. 269 (E. & A. 1870), which upheld a State riparian conveyance along a navigable river. Any confusion that remained after the *Stevens* case was resolved in *Marcus Sayre Co. v. Newark*, 60 N.J.Eq. 361, 369 (E. & A. 1900) where the court held:

> "The title to a tidal stream below ordinary high tide is in the State as absolute owner. The decision of this court in *Stevens* . . . placed the law on this subject on a firm foundation as a finality."

Thus, the position taken by the amici City of Elizabeth *et al.* is untenable, being unsupportable by either the substantive law or case law of New Jersey.

mon highway. ... In England, this is said to be vested in the king; here it is in the State." *Ball v. Slack*, 2 Whart 508, 539 (Pa. 1837). By various acts of the legislature, however, the owner of lands bounded by navigable water could also hold title to the tidelands between high and low water mark, subject to the public right of navigation, and to the authority of the legislature to make public improvements upon it, and to regulate his use of it. *See Shively v. Bowlby*, 152 U.S. at 22.

Delaware: In a boundary dispute case involving lands below tidal water, this court has stated that, in Delaware, "The title to the soil, which was subject to *jus publicum* while it was vested in the king and his grantees, is subject to the same restrictions in the ownership of Delaware". *State of New Jersey v. State of Delaware*, 291 U.S. 361, 372, 373, (1933). As noted in an early Delaware Supreme Court decision, the restrictions of this *jus publicum* in Delaware were summarized as follows:

> In all navigable waters, where the tide ebbs and flows, the people have of common right the privilege of fishing, and of navigation, between high and low water mark, though it be over private soil.

Bickel et al. v. Polk, 5 Del. (Harr.) 325, 326 (1851). Further, "the public have the right to take fish below high water mark, though upon soil belonging to an individual, and would not be trespassing in so doing . . ." *Ibid.* Thus, though a riparian owner can hold title down to the low water mark in Delaware, the riparian owner's title is subject to the public's *jus publicum* rights that exist below the highwater mark. It has also been stated that the tidelands in Delaware, which are subject to the public's trust rights, is not "limited to that appurtenant to an ocean. On the contrary, foreshore can be found along any tidal water". *Phillips v. State, Ex. Rel. Department of Natural Resources*, 449 A.2d 250, 255 (1982), *citing State v. Penn-*

sylvania Railroad Company, 228 A.2d 587 (1967) *aff'd* 267 A.2d 455 (1969).

Delaware also gave special statutory protection to its tidelands. Until 1843 adverse possession against the State was prohibited. In that year, however, the legislature authorized adverse possession against State land "other than salt marsh". 9 Del. L. 454 (1843). In 1852 this law was amended to exclude not only salt marsh, but also "beach or shore" lands.

Thus, although Delaware allowed private ownership of tidelands down to the low water mark, the public rights to use the tidelands, emanating from the English Common Law, were preserved. Tidelands impressed with the trust servitude at the time the Constitution was adopted, whether publicly or privately held, were not only those shorelands in Delaware adjacent to waters that were navigable-in-fact, but were those shorelands "found along any tidal water," *Phillips v. State*, 449 A.2d at 255; *i.e.*, wherever the tide ebbed and flowed.

Maryland: In Maryland, the shorelands between mean high water and mean low water passed by grant of the 1632 Charter of Maryland (Article IV) by Charles I to Caecillius Calvert, Baron of Baltimore. Thus at that time the tidelands were owned by the Crown. *Browne v. Kennedy*, 5 H. & J. 195 (Md. 1821). After the Revolution, the tidelands were held by the State for the benefit of the public by virtue of Article 5 of the Declaration of Rights in the Maryland Constitution. *Board of Public Works v. Larmar Corp.*, 262 Md. 24, 277, A.2d 427 (1971); *Kerpelman v. Board of Public works*, 261 Md. 436, 276 A.2d 56 (1971), *cert. denied*, 404 U.S. 858 (1971). *See also Day v. Day*, 22 Md. 530 (1865); *Baltimore v. McKim*, 3 Bland 453 (1831).

Prior to the enactment of the Act of 1862 (now Maryland Code Art. 54, sec. 48) there were instances where the State issued patents for land under navigable water,

defined by Maryland cases as "water where the tide ebbs and flows," with the patents being subject to the public rights to navigation and fishery. *Board of Public Works v. Larmar Corp., supra* at 47, 277 A.2d at 438; *Dept. of Natural Resources v. Ocean City*, 274 Md. 1 332, A.2d 630 (1975); *Van Ruymbeke v. Patapsco Industrial Park*, 261 Md. 470, 475, 276 A.2d 61, 64 (1971).

Virginia: In Virginia, the law at the time of adoption of the Constitution was a codification of the English common law, the Act of May 1780 (10 Hen. Stat. at Large, p. 226). This Act reserved "[A]ll unappropriated lands on the Bay of the Chesapeake, or the sea shore, or the shores of any river or creek" for use "as a common to all of the good people" of the Commonwealth. *Garrison v. Hall & als.*, 75 Va. 150, 160 (1881). The object of this Act was held to be "to reserve the right of fishing,...fowling and hunting, being only coextensive therewith, as a common right of the people of the State, as an aquatic right on the public waters, which embraced the shores and the lands adjacent to them, so far as necessary for the enjoyment of those rights . . .". *Id.* at 163. Most noticeable about this statutory language is that the shorelands held in trust "for all the good people" of Virginia were not delimited from the high water mark down, but included all the adjacent lands "so far as necessary for the enjoyment of those rights."

A Virginia Legislature Act of 1819 extended to the low water mark the seaward boundary of an upland owner's property, if the grant was made prior to 1780. However, even though title was in the upland owner, the shoreland remained subject to the public's right to fish, fowl and hunt. *See Bradford v. Nature Conservancy*, 224 Va. 181 (1982). Thus, any grant of the shorelands made after 1780 was "void," and such lands today are "held as a common" as they were 200 years ago. *Ibid.*

North Carolina: The Supreme Court of North Carolina has long established that where the waters covering lands are "navigable in law," those lands are held in trust by the State for the benefit of the public. *See Wilson v. Forbes*, 13 N.C. (2 Dev.) 31 (1828); *Shepard's Point Land Co. v. Hotel*, 132 N.C. 517 (1903). Waters that were "navigable at law" under the common law of England were those waters "where the tide flows and ebbs." *Wilson v. Forbes*, 13 N.C. at 38.

The Supreme Court of North Carolina has regularly applied the rule of public trust ownership of the bed to tidal, and non-tidal but navagable-in-fact, waters. See *Ingram v. Threadgill*, 14 N.C. (3 Dev.) 59 (1831); *State v. Twiford*, 136 N.C. 603, 48 S.E. 586 (1904). In the seminal case of *State v. Glen*, 52 N.C. (7 Jones) 321 (1859), the court reviewed its prior decisions and reaffirmed the primary classes of waters which continue to be recognized: public trust beds and private beds. The *Glen* court recognized that public trust ownership of the bed extends both to all lands subject to the ebb and flow of the tides to the farthest influx of salt water, *Collins v. Benbury*, 25 N.C. (3 Ired.) 277 (1842), and to all waters navigable by "sea vessels" as defined in *Wilson v. Forbes, supra.*

The boundary of the reserved submerged lands in North Carolina has always been the margin of the water body, i.e. the line of ordinary high water. *Ward v. Willis*, 51 N.C. (6 Jones) 183 (1858). More recently, the Supreme Court of North Carolina has defined the boundary of private/public trust ownership, in areas subject to lunar tides as the high water line of the foreshore. The foreshore is further described as an area where the public can walk when the tide is low, and ride in boats when it is high. *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 177 S.E. 2d 513 (1970).

Accordingly, North Carolina held her shorelands at the time of the adoption of the Constitution, and continues to

hold today, the bed of tidal waters, whether such lands are navigable or non-navigable, including mudflats and other areas exposed at low tide, in its trust capacity. Thus, the law of North Carolina is consistent with the law as decided by the Supreme Court of Mississippi.

South Carolina: In South Carolina, in accordance with the common law, the title to land under tide waters was in the State, and a grant of land bounded by such waters passed no title below high water mark. Thus, in 1884, the South Carolina Supreme Court, relying on the expression of the common law in *United States v. Pacheco*, 69 U.S. (2 Wall.) 587, 590 (1864), ruled that title to several hundred acres of salt water marshland "below the line of high water-mark, and subject to the daily ebb and flow of the tides" was held by the State. *State v. Pinckney*, 22 S.C. Rep. 484, 508 (1884).

The *Pinckney* court closely examined the common law on shorelands in order to answer the question presented to the court. "But finding it incumbent upon us to decide the question, seeing clearly the rule of the common law, and failing to find any authoritative decision which changes that rule, we must hold that it is now [in 1884], as it always has been, the law of the State." *Id.* at 509. Thus, at the time of statehood when the United States Constitution was adopted, South Carolina applied the common law to its shorelands, that is, those lands below the line of high water-mark, and subject to the daily ebb and flow of the tides" were held by the State.

Georgia: Georgia adopted the general common law rule that the boundary of private landowners abutting on the sea "or upon any estuary, tidal stream, or arm of the sea where there was a regular rise and fall of the tide" extended only to high water mark, the soil between high water mark and low water mark being the property of the State. *Johnson v. State*, 114 Ga. 790, 791, 40 S.E. 807, 808 (1901). The Georgia Supreme Court noted in 1901

that this rule had been "almost universally followed in the United States." *Ibid.* While the first Georgia Code adopted in 1863 expanded the concept of State-owned waters to include those freshwater rivers which are navigable-in-fact, the Georgia Supreme Court concluded that the Georgia statute which accorded to the adjacent landowner title to the bed of non-navigable stream did not apply to tidewaters. Lands subject to the ebb and flow of the tide, even if not navigable-in-fact, remained publicly-owned tidelands. *Ibid.*

With rare exceptions, grants along the coast of Georgia made during the colonial period and the early years of statehood did not convey any adjacent tidelands, whether navigable-in-fact or not. In a dispute over oyster rights in a stream subject to the ebb and flow of the tide and not navigable-in-fact, the Supreme Court of Georgia held that the non-navigable streams and adjacent marshes were not included in the Grant from King George II; the non-navigable creeks and marshes were public lands subject to a public oyster lease. *Oemler v. Green*, 134 Ga. 198, 67 S.E. 433 (1910). As a result, in the absence of a specific grant from the Crown or the State, private ownership in Georgia extends only to the upper limit of the salt marsh, which is co-extensive with the upper reach of the regular ebb and flow of the tide. Because of the tidal range averaging seven feet and the gently sloping shore along the coast of Georgia, the upper limit of the salt marsh extends not only above the point of navigability-in-fact, but also above the elevation of mean high water.

While there have been specific grants of title and other rights in lands covered by tidewaters, such private ownership remains subject to the public trust rights of navigation, transportation and public passage, regardless of navigability-in-fact of the adjacent waters. Ga. Laws, 1902, p. 108; Ga. Code Ann. sec. 44-8-8 (1982). In addition, the public has the right to fish in all waters subject to the ebb and flow of the tide, whether navigable or non-navig-

able. *West v. Baumgartner*, 124 Ga. App. 318, 184 S.E. 2d 533 (1971), *reversed on other grounds*, 228 Ga. 671 (1972).

As stated by this Court in *Shively v. Bowlby*, "[T]he foregoing summary of the laws of the original States shows that there is no universal and uniform law upon the subject; but that each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public." *Shively v. Bowlby*, 152 U.S. at 26. Nonetheless, some characteristics are common to all thirteen of the original States.

First, all thirteen original States, in their individual "views of justice and policy" have determined that they retain a public trust interest in their shorelands subject to the ebb and flow of the tide, regardless of the navigability of the adjacent water. Second, each of the thirteen original States, based on its own law, has determined the extent of their public trust shorelands. That is, each has individually defined, either legislatively or judicially, what the term "high water mark" means for its State. Most have determined this term to mean the "mean high tide line," in accordance with the Lord Chancellor Cranworth's interpretation of the English common law, while Georgia and Virginia, based on their laws, geography and usage, have determined that their trust shorelands extend up above the mean high water mark.

It is clear that each and every one of the thirteen original States made clear and definitive claims of ownership, or control, over the lands subject to the ebb and flow of the tide, without regard to the navigability of the adjacent water, at the time the Constitution was adopted. Thus, all shorelands subject to the ebb and flow of the tide, and at least up to the mean high tide line, whether owned out-

right by the States or privately held subject to the trust servitude, formed the corpus of the shoreland trust at the time the Constitution was adopted. As this trust was funded at the time of adoption of the Constitution, so has it been perpetuated by the Equal Footing Doctrine to the other 37 States that have since joined the Union.

B. The shorelands reserved by the States at the time of adoption of the Constitution were defined and delimited by the uses of the shorelands, and not solely by the criterion of whether the adjacent water was navigable. The public uses were not limited to navigation, but also included fishing, hunting, fowling, and bathing, among others.

Petitioners assert that a State's public trust shorelands, acquired upon admission to the Union on an equal footing with the original 13, include only those shorelands of waterways that are navigable-in-fact. To the contrary, in addition to tidality, the colonial shorelands imbued with the public trust were defined and delimited by the *uses* of the shorelands, and not solely by the criterion of whether the adjacent water was navigable-in-fact or not.

The uses of the shorelands 200 years ago by the citizens of the thirteen original States clearly included more than just navigation. The public trust doctrine traditionally provided that trust property was for the benefit of the public for navigation, commerce and fishing. *See* Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 Cornell L. Rev. 761, 801 (1979). But the shoreland uses "common to all the people" have been recorded as including "passing and repassing, navigation, fishing, fowling, sustenance, and all other uses of the water and its products . . .". *Arnold v. Mundy*, 6 N.J.L. (1 Hal.) 1, 76 - 77 (1821). The floating of logs from timbering operations was a recognized public use of tidewaters in New Hampshire. *See Concord Manufacturing Co. v. Robertson*, 66 N.H. 1, 5 (1889). Bathing,

the grazing of live stock, and transportation by high-wheeled carts pulled by "beach ponies" are recorded public uses of the shorelands in North Carolina around the end of the Revolution. *See* Dunbar, Gary S., *Historical Geography of North Carolina Outer Banks* (1958), at 20. The gathering of seaweed for fertilizer was commonplace in Connecticut 200 years ago, and was a protected public use of the tidelands. *See Chapman v. Kimball*, 9 Day at 38. In Rhode Island, "among the common-law rights of the public in the shore . . . are rights of fishing from the shore, taking seaweed and drift-stuff therefrom, going therefrom into the sea for bathing, and also as necessary for the enjoyment of any of these rights, and perhaps as a separate and independent right, that of passing along the shore." *Jackvony v. Powel*, 67 R.I. 218 (1941). As noted *supra*, Virginia recognized "fishing, hunting and fowling" as recognized uses in 1780 that were afforded trust protection, and defined the extent of these reserved shorelands as including all the adjacent lands "so far as necessary for the enjoyment of those rights." *Garrison v. Hall and als.*, 75 Va. at 163.

Fishing, as the term was understood in this country prior to the adoption of the Constitution, included the harvesting of shell fish as well as "floating fish." *Martin v. Waddell*, 44 U.S. (16 Pet.) 367, 413. The harvesting of this source of food was of great importance to the early settlors. "The men who first formed the English settlements, could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers .. if the settlor on the fast land thereby was excluded from this enjoyment, and unable to take shell-fish from its bottom, or fasten there a stake, or even bathe in its waters . . .". *Id.* at 414; *cf. Arnold v. Mundy*, 6 N.J.L. at 92. The harvesting of shellfish, by the very nature of clams, oysters, mussels and the like, quite com-

monly occurred in tidelands bordering waters that were not navigable-in-fact.

Obviously a waterway must be navigable-in-fact for it to be used for navigation. But what was considered a navigable waterway 200 years ago may not be so considered today. Indeed, historically, navigability was legally defined by the "flowing of the tide;"waterways upstream from the "flow of the tide" were by legal definition non-navigable. *See*, Angell, Joseph K., *A Treatise on the Right of Property in Tide Waters*, Little and Brown, Boston, 1847, Chapter III, at 73, *citing The Case of the Royal Fishery*, Davies's R. 149; Hale, *De Jure Maris*; *Sir Henry Constable's Case*, 5 Co. R. 107. *See also*, 1 *Swift Digest* 109 (1822), Ch. III, *Of the Right to the Ocean, Navigable Rivers, and Rivers not Navigable*. In addition, navigable watercraft two centuries ago included shallow draft, flat bottom vessels that were designed to be hauled up the beaches for stowage or repair, or manually propelled through very shallow marshes for fishing, hunting, or the discharge of passengers and cargo. Clearly, for these type of vessels, the shallow tidal creeks and streams in marshes and salt meadows were considered navigable waters.

But navigability was not a requisite for the thirteen original States to hold their tidal shorelands in trust. Many of the uses commonly made of the trust shorelands by the citizens of the thirteen original States 200 years ago were not physically or logically dependant upon whether the adjacent waters to the shorelands were navigable-in-fact. Many tidal wetlands good for fowling 200 years ago undoubtedly were worthless for navigation. Bathing in tidal waters was not limited to where the adjacent waters were navigable. The harvesting of clams, seaweed and the like on vast tidal mudflats certainly occured on non-navigable waters. Land transportation along the naturally obstruction-free upper shorelands undoubtedly was very important 200 years ago for the simple reason that the adjacent waters were not always navigable-in-fact.

One can only conclude that Petitioners' assertion—that only those shorelands adjacent to waters that were navigable-in-fact were reserved by the thirteen original States when the Constitution was adopted—is unfounded when the historical uses of these shorelands by our ancestors 200 years ago is considered. To hold that the thirteen original States only reserved shorelands adjacent to navigable-in-fact waters would be to ignore the States' recognition of the other legitimate public uses of the trust shorelands that are independent of the navigability of the adjacent waters: such as passing and repassing, fowling, hunting, shell fishing, land transportation, gathering seaweed and "drift stuff," and bathing. Not only did the thirteen original States collectively reserve their tidal shores for these purposes, but the extent of the shorelands so reserved was delimited by the uses. That is, the tidal shorelands were reserved "so far as necessary for the enjoyment of those rights." *Garrison v. Hall & als.*, 75 Va. at 160.[4]

C. Each new State upon entering the Union possessed the sovereign authority to define both the nature of her sovereignty over, and the physical boundaries of, her trust shorelands to the same extent as the thirteen original States.

The rules of property to be employed by a State over its shorelands are for each State to determine as an adjunct of its sovereignty over these lands. "[A]s a general proposition, the law of real property is, under our Constitution, left to the individual States to develop and administer." *Hughes v. Washington*, 389 U.S. 290, 295 (1967)

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[4] *Amici* do not imply that the existence of a public trust in the tidelands at issue is dependent upon whether ownership of that land passed to the state upon statehood. If the Court should rule that title to these tidelands remained in the federal government upon Mississippi's statehood and subsequently passed to the private parties, that land would still be impressed with a public trust. The extent of that trust is not presented in this case.

(Stewart, J., concurring). *See also Barney v. Keokuk*, 94 U.S. 324, 338 (1876). "Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law." *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. at 22. Thus, it is within a State's sovereign power to adopt, modify or reject common law rules. Incident to this sovereign power is a State's right to determine the boundaries of its shoreland trust, and the public uses for which the shorelands are held in trust. "[T]he rigid rules of the common law of England relating to littoral and riparian rights are not adoptable in every particular to our political and geographical conditions; that in adopting the common law of the mother country we did not incorporate into our system of jurisprudence any principals which are essentially inconsonant with our circumstances or repugnant to the spirit of our institutions ..." *Barnes v. Midland R.R. Terminal Co.*, 193 N.Y. 378, 384, 85 N.E. 1093, 1096 (1908).

"The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands below the high water mark, within their respective jurisdictions." *Shively v. Bowlby*, 152 U.S. at 26. Thus, as each new State entered the Union, she acquired the same rights and authorities as the thirteen original States to deal "with the lands under the tide waters within its borders according to its own views of justice and policy." *Shively v. Bowlby*, 152 U.S. at 26. Each new State, in its own trustee capacity, upon entering the Union had the authority to define both the nature of her sovereignty over, and the physical boundaries of, her trust shorelands to the same extent as the thirteen original States.

Nonetheless, Petitioners assert that Mississippi would acquire a "more-than-equal" footing by claiming as public trust shorelands those lands "subject to the ebb and flow of the tide" below the mean high tide line. Petitioners' Petition for a Writ of Certiorari, at 9. But as has been

shown, the colonial law, and the law of the individual States at the time of the adoption of the Constitution, clearly provided that the shorelands withheld by the thirteen original States were defined by the ebb and flow of the tide, without regard to the navigability-in-fact of the adjacent waters. Thus the remaining coastal States that have joined the Union, such as Mississippi, acquired the same trust corpus as did the thirteen original States—those land subject to the ebb and flow of the tide, regardless of the navigability-in-fact of the adjacent water, and at least up to the mean high tide line.

CONCLUSION

Reviewing the statutory and case law of the thirteen original States, and examining the usages that their citizens made of the tidal shorelands 200 years ago affirms that Petitioners' assertion—that only those shorelands adjacent to waters that were navigable-in-fact were reserved by the thirteen original States when the Constitution was adopted—is unfounded.

All of the thirteen original States, in their individual views of justice and policy determined what waters and tidelands they reserved 200 years ago when the Constitution was adopted. Each of the thirteen original States, based on its own law as it evolved from the English common law, determined the extent of their public trust shorelands as those lands subject to the ebb and flow of the tide up to the "high water mark." Each individually defined, either legislatively or judicially, what the term "high water mark" meant for its State. At the time the Constitution was adopted, most determined this term to mean the "mean high tide line." Some, however, based on their laws, determined that their shorelands extended above the mean high water mark.

Many of the uses commonly made of the trust shorelands by the citizens of the thirteen original States 200

years ago were not physically or logically dependant upon whether the adjacent waters to the shorelands were navigable-in-fact. The thirteen original States reserved those shorelands to the extent necessary to assure their citizens the enjoyment of those rights.

As each new State entered the Union, she acquired the same rights and authorities as the thirteen original States had. Each new State, in its own trustee capacity, upon entering the Union had the authority to define both the nature of her sovereignty over, and the physical boundaries of, her trust shorelands to the same extent as the thirteen original States.

Thus, all shorelands subject to the ebb and flow of the tide, and at least up to the mean high tide line, whether owned outright by the States or privately held subject to the trust servitude, formed the corpus of the trust at the time the Constitution was adopted. As this trust was funded by the thirteen original States at the time of adoption of the Constitution, so has it been perpetuated by the Equal Footing Doctrine to the other 37 States that have joined the Union. As a result, each new State that has entered the Union, such as Mississippi, received in trust those shorelands subject to the ebb and flow of the tide up to, at the very least, the mean high tide line.

For these reasons, we urge this Honorable Court to affirm the decision of the Mississippi Supreme Court.

Respectfully submitted,

DAVID C. SLADE, ESQ.
Counsel of Record
COASTAL STATES ORGANIZATION
Suite 312
444 N. Capitol Street, NW.
Washington, D.C. 20001
202-628-9636